Zulkifli bin Arshad v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–39 OF 2004
ZULKEFLI, ABDULL HAMID EMBONG AND KN SEGARA JJCA
8 AUGUST 2007

Criminal Law — Dangerous drugs — Trafficking — Joint charges of trafficking in a vehicle and in a house — Whether direct evidence of trafficking proved — Dangerous Drugs Act 1952 ss 37(da)(vi), 39A(2) & 39B(1)(a)

The accused was found with cannabis during an inspection and search of the car JCQ 2852 by SP7. The drug was found in a black NIKE sports/traveling bag positioned in the middle of the back passenger seat. Inside the black NIKE bag SP7 found six compressed slabs of plant material, subsequently confirmed by the chemist (SP9) to be 5796.7g of cannabis, the subject matter of the first charge.

After an interrogation, SP7 and his police party, together with the appellant, proceeded to house No PS31-3, Parit Sengkuang, Jalan Kluang, Batu Pahat ('house PS31-3') where they found four compressed slabs of plant material in the third bedroom of the empty house, subsequently confirmed by the chemist to be 3867.2g of cannabis, the subject matter of the second charge. The accused was charged with the two separate charges under s 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') for trafficking in cannabis.

On the above evidence, the learned trial judge held that a prima facie case had been made out against the appellant. He did not invoke any of the statutory presumptions of the Act to make out a case of possession or trafficking against the appellant, at the close of the case for the prosecution. The learned trial judge then called upon the appellant to enter upon his defence. The appellant was subsequently convicted and sentenced to death. He appealed. Counsel for the appellant submitted that the trial judge had misdirected himself in law in deciding that the appellant was trafficking in the drug as he had wrongly taken into consideration the combined weight of the cannabis in the two separate trafficking charges against the appellant. Counsel for the appellant further submitted, that the trial judge had misdirected himself in holding there was actual possession and actual trafficking and, that he had failed to invoke the presumption of trafficking under s 37(da)(vi) of the Act at the close of the case for the prosecution.

Held, allowing the appeal, substituting a conviction under s 6 of the Act for the first and second charge and, sentencing the appellant to imprisonment for a term of 18 years with effect from the date of his arrest and 10 strokes of the rotan, in respect of each charge, the sentence of imprisonment for both the charges to run concurrently:

(1) The learned trial judge seriously misdirected himself in holding that because it was a joint trial of the first and second charge against the appellant, the 'evidence on record is seamless and indivisible and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession' (see para 16).

(2) The first charge and second charge were distinct and separate trafficking charges; one was trafficking in a car and the other, trafficking in a house. The evidence adduced by the prosecution did not directly or indirectly disclose that the appellant had any nexus to the drugs discovered in house No PS31-3 at 1.30am and, the drugs discovered in car JCQ 2852 at 1am. The learned trial judge, consequently, had misdirected himself in holding that there was direct (or actual) evidence of trafficking in relation to the first charge, contrary to the evidence adduced. The evidence adduced at its highest, in relation to the first charge, only justified a finding of the offence of possession under s 6 punishable under s 39A(2) of the Act, as the learned trial judge did not invoke the trafficking presumption under s 37(da)(vi) of the Act, at the close of the prosecution's case to bring home the offence of trafficking. The presence of the drug in the car, per se, in the absence of any evidence of any overt act in relation thereto by the appellant justifying such overt act to fall within the meaning of trafficking under s 2 of the Act, could not amount to the offence of trafficking under s 39B(1)(a) of the Act (see para 17).

(3) With regard to the second charge, the learned trial judge had also misdirected himself in holding there was direct evidence of trafficking against the appellant at the close of the prosecution's case, contrary to the evidence adduced. It was abundantly clear, on the evidence adduced by the prosecution, that the appellant was not arrested at the house, PS31-3, where the drugs the subject matter of the second charge were recovered. Although there was evidence he was a tenant of the house at the material time, there was evidence from the landlord that the landlord had retained a set of keys to the house when he let the house to the appellant. In such circumstances, the landlord certainly could have access to the house in the absence of any unequivocal term of the tenancy denying him access. Nevertheless, the learned trial judge made a finding that the appellant had 'sole control and management' of the house PS31-3, exclusive possession of PS31-3 and, consequently possession of the drugs found in the third bedroom (see para 20).

(4) The learned trial judge had clearly misdirected himself in holding that there was direct evidence of 'trafficking activity in PS31-3'. The learned trial judge's finding that 'PS31-3 was used for no other purpose than to keep or store the four slabs of drugs' was totally against the weight of the evidence. There was no evidence at all that the appellant had taken anything, let alone drugs, into the house after the landlord had given him a set of the keys. There was no evidence as to when the appellant went into actual physical possession or occupation of the house. The appellant was not arrested at the house but, elsewhere whilst in his car at the 10th Km Jalan Kluang and, was not in physical contact with the four slabs of drug. There was no evidence, direct or circumstantial, that the drugs were kept or stored by the appellant in the third

bedroom. There was no evidence of any overt act by the appellant, at anytime, in relation to the drugs found in the third bedroom, falling within the context of the 'trafficking' definition in s 2 of the Act (see para 22).

[Bahasa Malaysia summary

Tertuduh dijumpai dengan kanabis semasa pemeriksaan dan siasatan kereta JCQ 2852 oleh SP7. Dadah tersebut dijumpai dalam sebuah beg sukan NIKE berwarna hitam yang terletak di tengah-tengah tempat duduk penumpang belakang. Di dalam beg hitam NIKE itu SP7 telah menjumpai enam keping mampat bahan tumbuhan, kemudiannya telah disahkan oleh ahli kimia (SP9) adalah kanabis seberat 5796.7g, subjek utama pertuduhan pertama.

Selepas soal siasat, SP7 dan pasukan polisnya, bersama dengan perayu, telah ke rumah No PS31-3, Parit Sengkuang, Jalan Kluang, Batu Pahat ('rumah PS31-3') di mana mereka menjumpai empat keping mampat bahan tumbuhan dalam bilik tidur ketiga sebuah rumah kosong, kemudiannya disahkan oleh ahli kimia adalah kanabis seberat 3867.2g, subjek utama pertuduhan kedua. Tertuduh telah dituduh dengan dua pertuduhan berasingan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar kanabis.

Berdasarkan keterangan di atas, hakim perbicaraan yang bijaksana telah memutuskan bahawa satu kes prima facie telah dibuktikan terhadap perayu. Beliau tidak menggunakan apa-apa andaian statutori Akta tersebut untuk membuktikan satu kes pemilikan atau pengedaran terhadap perayu, di penutup kes pihak pendakwaan. Hakim perbicaraan yang bijaksana kemudian telah memanggil perayu untuk memasuki pembelaannya. Perayu kemudian telah disabitkan dijatuhkan hukuman mati. Beliau telah merayu. Peguam bagi pihak perayu berhujah bahawa hakim perbicaraan telah salah arah dari segi undang-undang dalam memutuskan bahawa perayu telah mengedar dadah kerana beliau terkhilaf dalam menimbangkan gabungan berat kanabis dalam dua pertuduhan pengedaran yang berasingan terhadap perayu. Peguam bagi pihak perayu seterusnya berhujah, bahawa hakim perbicaraan telah salah arah dalam memutuskan terdapat milikan sebenar dan pengedaran sebenar dan, bahawa beliau telah gagal untuk menggunakan andaian pengedaran di bawah s 37(da)(vi) Akta tersebut di penutup kes pihak pendakwaan.

Diputuskan, membenarkan rayuan tersebut, menggantikan satu sabitan di bawah s 6 Akta tersebut untuk pertuduhan pertama dan kedua dan, menjatuhkan hukuman penjara ke atas perayu untuk tempoh 18 tahun bermula kuat kausa daripada tarikh tangkapannya dan 10 sebatan rotan, untuk setiap pertuduhan, hukuman penjara untuk kedua-dua pertuduhan hendaklah berjalan serentak:

(1) Hakim perbicaraan yang bijaksana telah salah arah dalam memutuskan bahawa kerana terdapat gabungan perbicaraan untuk pertuduhan pertama dan kedua terhadap perayu, 'evidence on record is seamless and indivisible and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession' (lihat perenggan 16).

(2) Pertuduhan pertama dan kedua adalah pertuduhan pengedaran yang berbeza dan berasingan; satu adalah pengedaran dalam kereta dan satu lagi, pengedaran dalam rumah. Keterangan yang dikemukakan oleh pihak pendakwaan tidak secara langsung atau tidak langsung menunjukkan bahawa perayu mempunyai kaitan dengan dadah yang dijumpai di rumah PS31-3 pada pukul 1.30 pagi dan, dadah yang dijumpai dalam kereta JCQ 2852 pada pukul 1 pagi. Hakim perbicaraan yang bijaksana, berikutan itu telah salah arah dalam memutuskan bahawa terdapat keterangan langsung (atau sebenar) pengedaran berkaitan pertuduhan pertama, bertentangan dengan keterangan yang dikemukakan. Keterangan yang dikemukakan paling tidak, berkaitan pertuduhan pertama, hanya menjustifikasikan satu penemuan kesalahan milikan di bawah s 6 yang boleh dihukum di bawah s 39A(2) Akta tersebut, kerana hakim perbicaraan yang bijaksana tidak menggunakan andaian pengedaran di bawah s 37(da)(vi) Akta tersebut, di penutup kes pihak pendakwaan untuk membuktikan kesalahan pengedaran itu. Kewujudan dadah dalam kereta itu, per se, dalam ketiadaan apa-apa keterangan tindakan terang-terangan berkaitannya oleh perayu menjustifikasikan tindakan terang-terangan sebegitu untuk terangkum dalam maksud pengedaran di bawah s 2 Akta tersebut, tidak dapat membentuk kesalahan pengedaran di bawah s 39B(1)(a) Akta tersebut (lihat perenggan 17).

(3) Berhubung pertuduhan kedua, hakim perbicaraan yang bijaksana juga telah salah arah dalam memutuskan bahawa terdapat keterangan sebenar pengedaran terhadap perayu di penutup kes pihak pendakwaan, bertentangan dengan keterangan yang dikemukakan. Adalah jelas, berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan, bahawa perayu tidak ditangkap di rumah PS31-3 di mana dadah yang merupakan subjek utama pertuduhan kedua itu dijumpai. Meskipun terdapat keterangan beliau adalah penyewa rumah itu pada masa matan, terdapat keterangan daripada tuan rumah bahawa tuan rumah telah menyimpan satu set kunci kepada rumah itu apabila beliau menyewa rumah itu kepada perayu. Dalam keadaan sedemikian, tuan rumah itu sememangnya mempunyai akses ke rumah itu jika tiada apa-apa terma jelas tentang penyewaan itu yang menafikannya akses. Meskipun begitu, hakim perbicaraan yang bijaksana membuat penemuan bahawa perayu mempunyai 'sole control and management' rumah PS31-3, milikan eksklusif PS31-3 dan, seterusnya milikan dadah yang didapati dalma bilik tidur ketiga (lihat perenggan 20).

(4) Hakim perbicaraan yang bijaksana jelas telah salah arah dalam memutuskan abahwa terdapat keterangan langsung 'trafficking activity in PS31-3'. Penemuan hakim perbicaraan yang bijaksana bahawa 'PS31-3 was used for no other purpose than to keep or store the four slabs of drugs' sememangnya berdasarkan berat keterangan. Tiada keterangan langsung yang perayu telah mengambil apa-apa, lebih-lebih lagi dadah itu, ke dalam rumah selepas tuan rumah memberikannya set kunci itu. Tiada keterangan tentang bila perayu mempunyai milikan fizikal sebenar atau menduduki rumah itu. Perayu tidak ditangkap di rumah itu tetapi di tempat lain iaitu semasa dalam keretanya di Km 10, Jalan Kluang dan, tiada hubungan fizikal dengan empat keping dadah itu, Tiada keterangan, secara langsung atau berdasarkan keadaan, yang dadah itu disimpan oleh perayu dalam bilik tidur ketiga itu. Tiada keterangan

tentang apa-apa tindakan terang-terangan perayu pada bila-bila masa berkaitan dadah yang dijumpai dalam bilik tidur ketiga itu yang terangkum dalam konteks definisi 'trafficking' dalam s 2 Akta tersebut (lihat perenggan 22).]

Notes

For cases on trafficking of dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–167.

Cases referred to

PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
Yusmarin bin Samsuddin v PP [1999] 4 MLJ 625 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(da)(vi), 39A(2)(f), 39B(1)(a), 39B(2)

Appeal from: Criminal Trials No 45–22 of 2001 and No 45–23 of 2001 (High Court, Muar)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Eddie Yeo (Deputy Public Prosecutor, Attorney General's Chemabers) for the respondent.

KN Segara JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death at a joint trial at the Muar High Court in respect of two separate charges under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in cannabis.

[2] In Criminal Trial No 45–22 of 2001 the charge ('the first charge') relates to the offence of trafficking in 5796.7g of cannabis, in car No JCQ 2852, on 27 January 2001, at about 1am, beside Sharp-Roxy factory at Km 10, Jalan Kluang, Sri Gading, Batu Pahat. The first charge reads:

Bahawa kamu pada 27 Januari 2001 jam lebih kurang 1 pagi, di dalam kereta No Pendafataran JCQ 2852 di tepi Kilang Sharp Roxy, Km 10, Jalan Kluang, Sri Gading, Batu Pahat, di dalam daerah Batu Pahat, di dalam Negeri Johor, Darul Ta'zim, bagi pihak diri kamu sendiri atau bagi pihak sesiapa telah didapati mengedar dadah berbahaya jenis cannabis, sejumlah berat 5,796.7g dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[3] In Criminal Trial No 45–23 of 2001 the charge ('the second charge') relates to trafficking in 3867.2g of cannabis, in house No PS31-3, Parit Sengkuang, Jalan Kluang, Sri Gading on 27 January 2001, at about 1.30am. The second charge reads:

Bahawa kamu pada 27 Januari 2001 jam lebih kurang 1.30 pagi, di rumah beralamat PS31-3, Parit Sengkuang, Jalan Kluang, Seri Gading, Batu Pahat, di dalam daerah Batu Pahat, di dalam Negeri Johor Darul Ta'zim, bagi pihak diri kamu sendiri atau bagi pihak

sesiapa telah di dapati mengedar dadah berbahaya jenis cannabis sejumlah berat 3,867.2g, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[4] In this appeal before us, at the very outset, counsel for the appellant submitted that the trial judge had misdirected himself in law in deciding that the appellant was trafficking in the drug as he had wrongly taken into consideration the combined weight of the cannabis in the two separate trafficking charges against the appellant. Counsel for the appellant further submitted, that the trial judge had misdirected himself in holding there was actual possession and actual trafficking and, that he had failed to invoke the presumption of trafficking under s 37(da)(vi) of the Act at the close of the case for the prosecution. After a careful perusal of the evidence recorded at the trial and the grounds of judgment, we agree with learned counsel for the appellant that the learned judge had misdirected himself in calling upon the appellant to enter his defence to a charge of trafficking without invoking s 37(da)(vi) of the Act. At the conclusion of the hearing we unanimously allowed the appeal, quashed the convictions and set aside the death sentences. As conceded by counsel on behalf of the appellant, which we considered justified, we substituted therefor a conviction under s 6 of the Act for the first and second charge and, after hearing the plea in mitigation, sentenced the appellant (pursuant to s 39A(2)(f) of the Act) to imprisonment for a term of 18 years with effect from the date of his arrest and 10 strokes of the rotan, in respect of each charge, the sentence of imprisonment for both the charges to run concurrently.

[5] Briefly, the case for the prosecution is this.

[6] On 27 January 2001, at about 12.10am, acting on information received, C/I Ramesh a/l Nagayah (SP7) briefed a team of nine police personnel to lay ambush and take up positions in three locations, each about ½ Km. apart from the other. The 3 locations were Km 9.5, Km 10 and Km 10.5 Jalan Kluang/Batu Pahat. All of them were not wearing police uniform when they proceeded in 3 vehicles to their respective positions, assigned by SP7, after the briefing was over, at about 12.35am.

[7] SP7 and D/Kpl Jayarajan (SP10) were to proceed to a car JCQ 2852 at Km10, near the Sharp-Roxy factory. SP7 proceeded to Km10, together with SP10, in a car driven by SP7 and, as soon as he arrived near the Sharp-Roxy factory he saw car JCQ 2852, a white Proton Iswara, parked near the public telephones with its engine running and, the car was facing the direction of Jalan Kluang. SP7 stopped his car about 1–2 meters behind car JCQ 2852 and instructed SP10 to get out of his car, proceed to m/car JCQ 2852 and, gain entry into the said car via the front passenger's door. At about the same time, SP7 also got out of his car and proceeded to the driver's door of car JCQ 2852.When he arrived besides the driver's door, he saw a male Malay (the appellant) seated at the driver's seat. The driver's door window was open. He saw SP10 open the front passenger door and enter the car. At that moment, SP7 reached his hand into the car for the ignition key, switched off the engine and removed the ignition key. He then introduced himself as police. The appellant attempted to open the driver's door but SP10, who was now inside the car, prevented him from doing so.

[8] SP7 opened the driver's door and ordered the appellant to get out of the car. SP10 also got out of the car and stood guard over the appellant who was now standing near the driver's door of car JCQ 2852. SP10 carried out a physical search and examination of the appellant but did not find any drugs on the person of the appellant. SP7 then carried out an inspection and search of car JCQ 2852.

[9] SP7 saw a black NIKE sports/traveling bag positioned in the middle of the back passenger seat. He removed the bag and placed it on the road near the driver's door. He then unzipped the bag. At that moment a struggle occurred between SP7 and the appellant, upon SP7 perceiving that the appellant intended to run away. Thereafter, SP7 examined the bag in the presence of the appellant who was beside him, with SP10 keeping guard of the appellant. Inside the black NIKE bag SP7 found six compressed slabs of plant material, subsequently confirmed by the chemist (SP9) to be 5796.7g of cannabis, the subject matter of the first charge. Upon discovery of the six compressed slabs in the NIKE bag, SP7 instructed SP10 to handcuff the appellant. SP7 then called all the members of his police party, from their respective assigned positions, to come over to the scene where he was with SP10 and the appellant.

[10] After all the members of the police party had gathered at the scene of arrest of the appellant, SP7, together with Inspector Balan and Inspector Arshad, made a further thorough examination of car JCQ 2852 but, did not discover anything incriminating the appellant.

[11] It was in evidence that Jamari bin Diron (SP4), who owned the car JCQ 2852, had handed the car to Azhari bin Harun (SP6) to be sold. SP6 testified that he sold the car to the appellant, who paid an initial deposit of RM2,000.

[12] After that, still at the same scene, in the presence of all the members of the police party, SP7 interrogated the appellant. No caution appears to have been administered to the appellant before he was questioned. No admissions appear to have been made by the appellant to SP7 during the interrogation at the scene. After the interrogation, SP7 and his police party, together with the appellant, proceeded to house No PS31-3, Parit Sengkuang, Jalan Kluang, Batu Pahat. They arrived there at about 12.50am.

[13] SP7 seized a bunch of keys from the rear left pocket jeans that the appellant was wearing and, opened the grille door and wooden door of house PS31-3.The house was in darkness. There were no occupants. SP7 switched on the house lights. The house was empty, devoid of any furniture, clothing, documents, and household or personal items to suggest the house was in occupation by anyone at the material time. There were three rooms. The doors of the first and second room were open and the rooms were empty. The door of the third room was locked. Using a key from the bunch of keys seized from the appellant, SP7 unlocked the door of the third room and they entered the room. In one corner of the room was a grey plastic sheet and, underneath the sheet were 4 compressed slabs of plant material, subsequently confirmed by the chemist to be 3867.2g of cannabis, the subject matter of the second charge.

[14] Goo Kwan Leng (SP3), the landlord of house No PS31-3 testified that in mid January 2001, he let the house to the appellant. He gave a set of the house keys to the appellant in mid January as well. He retained a set of the keys for himself but there was no evidence whether he had brought this fact to the attention of the appellant. SP3 did not know when the appellant went into occupation of the house after he had handed to him a set of the keys. The appellant did not tell SP3 when he actually intended to occupy the house. There was no written tenancy agreement between SP3 and the appellant.

[15] On the above evidence, the learned trial held that a prima facie case had been made out against the appellant. He did not invoke any of the statutory presumptions of the Act to make out a case of possession or trafficking against the appellant, at the close of the case for the prosecution. The learned trial judge then called upon the appellant to enter upon his defence. In his grounds of judgment the learned judge stated, inter alia:

> It was clearly proved that the accused was the sole occupant of JCQ 2852, and that the black bag and the contents of cannabis were on the rear passenger seat of the said car that belonged to him. It was clearly proved that the accused had custody and control of JCQ 2852 at the material time, given the undisputed evidence that the accused was the sole occupant and was seated on the driver seat of a car with its engine running at the material time. It was clearly proved that cannabis was recovered from a house that was under the sole control and management of the accused. The latter was proved by the following undisputed facts: (i) that the accused was the tenant of PS31-3; (ii) that the accused had possession of the keys to PS31-3 and the third bedroom;, and (iii) that PS31-3 was a bare and empty house totally bereft of all signs or articles of any human habitation or occupation, which condition and state of PS31-3 said that there could not have been other tenants, other occupiers or other users of PS31-3 and further said the accused must have had exclusive possession of PS31-3. That the accused had exclusive possession of PS31-3 and the keys to the third bedroom must lead to the inevitable deduction that the accused had possession of the drugs in the third bedroom.
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> The prosecution had also proved the concurrent presence of drugs in a house under the control and management of the accused at about the same time that the accused was in possession of similar drugs at the 10 Km Jalan Kluang. And this is a joint trial, where the evidence on record is seamless and indivisible, and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession.
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> ...
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> Rather, the evidence adduced by the prosecution proved that the accused was keeping and or storing drugs in house PS31-3. And proof of that activity made it wholly implausible that the possession of drugs of such a substantial quantity by the accused in JCQ 2852 could have been mere possession. The aforesaid maximum evaluation of the prosecution evidence showed that the prosecution had proved the facts and circumstances for to say that the accused was trafficking. Even without legal presumptions, there was clear, strong, and most credible evidence to each ingredient of each charge. The evidence adduced was more than sufficient to warrant an answer. On both counts, there was a prima facie case to answer.

[16] The learned trial judge seriously misdirected himself in holding that because it was a joint trial of the first and second charge against the appellant, the 'evidence

on record is seamless and indivisible and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession.'

[17] The first charge and second charge are distinct and separate trafficking charges; one is trafficking in a car and the other, trafficking in a house. The evidence adduced by the prosecution did not directly or indirectly disclose that the appellant had any nexus to the drugs discovered in house No PS31-3 at 1.30am and, the drugs discovered in car JCQ 2852 at 1am. There was no evidence that anyone had observed or seen the appellant to have taken the black bag out of house No PS 31-3 and place it on to the rear seat of car JCQ 2852 or alternatively, saw him bring out four packages from the said house and keep it inside the black bag on the rear seat of the car and, thereafter proceed to 10 Km Jalan Kluang and stop his car, with its engine kept running, besides the public telephones outside the Sharp/Roxy factory at about 1am. The learned trial judge, consequently, has misdirected himself in holding that there was direct(or actual) evidence of trafficking in relation to the first charge, contrary to the evidence adduced. The evidence adduced at its highest, in relation to the first charge, only justifies a finding of the offence of possession under s 6 punishable under s 39A(2) of the Act, as the learned trial judge did not invoke the trafficking presumption under s 37(da)(vi) of the Act, at the close of the prosecution's case to bring home the offence of trafficking. The presence of the drug in the car, per se, in the absence of any evidence of any overt act in relation thereto by the appellant justifying such overt act to fall within the meaning of trafficking under s 2 of the Act, cannot amount to the offence of trafficking under s 39B(1)(a) of the Act.

[18] In *Yusmarin bin Samsuddin v Public Prosecutor* [1999] 4 MLJ 625, the appellant was convicted for trafficking in 2,863.1g of cannabis and sentenced to death. The undisputed evidence showed that the offending drug was found in four plastic packages that were placed in an unlocked black bag and that black bag was found unconcealed on the back seat of the car driven by the appellant. The car belonged to the appellant's father but he was alone when the car was stopped and searched by the police. The Court of Appeal held (at p 627):

> Before us, he appealed against both his conviction and sentence.... In the light of such circumstantial evidence, we had found that the trial judge had misdirected himself when he ruled that trafficking had been proved. On the contrary, we consider that the prosecution evidence merely supports the lesser offence for possession,... as the presence of the drug in the car, per se, cannot amount to trafficking. See the case of *PP v Lin Lian Chen* [1991] 1 MLJ 361; [1992] 2 MLJ 561 (SC).
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> It was under those circumstances that we had allowed the appellant's appeal against his conviction for trafficking and substituted it to that of being in possession of the dangerous drug under s 12(2) of the Act, and sentenced him to 18 years imprisonment to take effect from the date of his arrest and 12 strokes of the rotan under s 39A(2)(f) of the Act.

[19] In *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 a party of police officers ambushed and arrested the respondent as soon as he had parked his car in Stadium Negara Car Park, Kuala Lumpur. The car was immediately searched and recovered from the foot-well of the car's rear nearside passenger seat was a plastic bag containing six newspaper packages, each of which contained a pink granular

substance. A second search of the car subsequently resulted in the recovery of: another newspaper package containing a pink granular substance in the glove compartment; the registration card and car licence of the car, both in the name of Lim Hooi Yong; several business cards bearing the name of James Goh Liong Sin and a cigarette packet on the dashboard containing six cigarettes, each of which had traces of heroin. When the pink powdery substance was analysed by the chemist, it was found to contain in all 578.94g of heroin. The Supreme Court held, inter alia, that (at p 567):

> Although the respondent was the sole occupant of the motor car, being the driver and therefore in charge of it, he was not its owner and there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits. The evidence against the respondent amounted only to grave suspicion and is insufficient to attract the presumption of custody and control under s 37(d) of the Act. On this ground alone the learned judge was entitled to rule, at the close of the prosecution case, that the respondent had no case to answer and acquit and discharge him.

[20] Now, returning to the present appeal before us, with regard to the second charge, we find that the learned trial judge has also misdirected himself in holding there was direct evidence of trafficking against the appellant at the close of the prosecution's case, contrary to the evidence adduced. It is abundantly clear, on the evidence adduced by the prosecution, that the appellant was not arrested at the house, PS31-3, where the drugs the subject matter of the second charge were recovered. Although there was evidence he was a tenant of the house at the material time, there was evidence from the landlord that the landlord had retained a set of keys to the house when he let the house to the appellant. In such circumstances, the landlord certainly could have access to the house in the absence of any unequivocal term of the tenancy denying him access. Nevertheless, the learned trial judge made a finding that the appellant had 'sole control and management' of the house PS31-3, exclusive possession of PS31-3 and, consequently possession of the drugs found in the third bedroom, when he stated in his grounds of judgment as follows:

> It was clearly proved that the cannabis were recovered from a house that was under the sole control and management of the accused. The latter was proved by the following undisputed facts: (i) that the accused was the tenant of PS31-3; (ii) that the accused had possession of the keys to PS31-3 and the third bedroom; and (iii) that PS31-3 was a bare and empty house totally bereft of all signs or articles of any human habitation or occupation, which condition and state of PS31-3 said that there could not have been other tenants, other occupiers or other users of PS31-3, and further said that the accused must have had exclusive possession of PS31-3. That the accused had exclusive possession of PS31-3 and the keys to the third bed room must lead to the inevitable deduction that the accused had possession of the drugs in the third bedroom.

[21] Having made a finding that the appellant was in possession of the drugs in the third bedroom, the learned trial judge went on to make the following finding:

> But in that house and on the floor of a locked room were four slabs of drugs lying on top of newsprint but underneath a large grey plastic sheet. The four slabs of drugs were found in a state of camouflage. Given that state of camouflage and the undisputed fact that the

house was otherwise totally bare (other than the presence of a small paper box in the second room), the reasonable deduction had to be that PS31-3 was used for no other purpose than to keep and or store the four slabs of drugs.

There could be no other reasonable or plausible deduction. The fact of the matter is that there were simply no other articles or belongings in PS31-3 as could suggest that PS31-3 was used or could have been used for some other purpose than to keep and store the said 4 slabs of drugs. Those particular circumstances undoubtedly said that the house was used to keep and or store the said four slabs of drugs found in PS31-3. The Dangerous Drugs Act 1952 provides that 'trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling giving receiving storing administering, transporting, carrying, sending, delivering, procuring, supplying or distributing dangerous drug.' In the case of the four slabs of drugs in PS31-3, there was direct evidence of trafficking. And that direct evidence of trafficking activity in PS31-3 said that it was totally implausible that the drugs in the car could have been for personal consumption.

[22] The learned trial judge has clearly misdirected himself in holding that there was direct evidence of 'trafficking activity in PS31-3'. The learned trial judge's finding that 'PS31-3 was used for no other purpose than to keep or store the four slabs of drugs' is totally against the weight of the evidence. There was no evidence at all that the appellant had taken anything, let alone drugs, into the house after the landlord had given him a set of the keys. It was hardly 14 days since he received the keys. There was no evidence as to when the appellant went into actual physical possession or occupation of the house. The appellant was not arrested at the house but, elsewhere whilst in his car at the 10 Km Jalan Kluang and, was not in physical contact with the four slabs of drug. There was no evidence, direct or circumstantial, that the drugs were kept or stored by the appellant in the third bedroom. There was no evidence of any overt act by the appellant, at anytime, in relation to the drugs found in the third bedroom, falling within the context of the 'trafficking' definition in s 2 of the Act.

[23] For the above reasons we find the learned trial judge has misdirected himself in holding that there was actual (direct) evidence of trafficking in respect of each of the charges. We, therefore, allow this appeal. Both the convictions and sentences under s 39B(2) of the Act are set aside. We substitute, therefor, a conviction under s 6 of the Act for both the charges. The appellant is sentenced to 18 years imprisonment from date of arrest and 10 strokes of the rotan, in respect of each charge. The term of imprisonment for both the charges is to run concurrently.

Appeal allowed.

Reported by Loo Lai Mee